FILED

97 1114 DEC 29 1997

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

KEITH ROBERT LUGO)
)
Petitioner,)
)
v.)
)
K.W. PRUNTY, WARDEN,)
)
Respondent.)
_____)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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48 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court failed to discharge its obligation to appoint petitioner conflict-free counsel after being advised of the possibility of a conflict of interest under the principles of Wood v. Georgia, 450 U.S. 261 (1981).

2. Whether petitioner was entitled to an evidentiary hearing on his federal habeas corpus claim that a conflict of interest existed between himself and his court-appointed trial counsel which adversely affected trial counsel's performance on his behalf.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Keith Robert Lugo,[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 29, 1997.

OPINION BELOW

On July 24, 1997, the United States Court of Appeals for the Ninth Circuit entered its memorandum opinion affirming the order of the district court denying petitioner's petition for writ of habeas corpus filed with that court pursuant to the provisions of 28 U.S.C. §

[1] There are no parties to the proceedings other than those named in the caption to this petition.

2254. On September 29, 1997, the Court of Appeals entered an order denying the Petition for Rehearing and Suggestion for Rehearing En Banc. A copy of the unpublished memorandum of the Court of Appeals is attached hereto as Appendix "A". A copy of the September 29, 1997, order denying the Petition for Rehearing and Suggestion for Rehearing En Banc is attached hereto as Appendix "B".[2]

JURISDICTION

On July 24, 1997, the Court of Appeals entered its memorandum opinion affirming the order of the district court denying petitioner's petition for writ of habeas corpus filed with that court pursuant to the provisions of 28 U.S.C. § 2254. On September 29, 1997, the Court of Appeals entered its order denying the Petition for Rehearing and Suggestion for Rehearing En Banc. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1). This petition is filed in a timely fashion as it is submitted within ninety (90) days of the date of the denial of the Petition for Rehearing as provided in Rule 13(3), Rules of the Supreme Court of

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[2] There are no parties to the proceedings other than those named in the caption to this petition.

the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty or property without due process of law . . . .

The Sixth Amendment to the United States Constitution provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

The provisions of 28 U.S.C. § 2254, in effect at the time that petitioner filed his petition for writ of habeas corpus in the district court on August 23, 1994, are set forth in full in Appendix "C" to this petition.

STATEMENT OF THE CASE

On July 26, 1988, a complaint was filed in San Diego Municipal Court charging petitioner, Keith Robert Lugo, with two counts of murder in violation of Penal Code § 187(a). [C.T. 1, 1][3]

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[3] "C.T." refers to the Clerk's Transcript prepared by the Clerk of the San Diego Superior Court for petitioner's direct appeal to the California Court of Appeal, Fourth Appellate District, Division One, lodged with the district court.

Petitioner Lugo was in federal custody at that time. Co-defendant Michael Edward Smith was named in the same complaint on identical charges while in custody in the State of Colorado on an unrelated charge. On July 26, 1988, Attorney John G. Cotsirilos agreed to represent petitioner in the above-described matter upon being advised that attorney Charles Sevilla, Mr. Lugo's counsel on the preceding federal matter, could not represent Mr. Lugo due to the fact that he had interviewed potential witnesses in the related federal matter and would probably be called as a witness in the murder trial.

Sevilla advised Cotsirilos that Mr. Lugo should be made aware of his speedy trial rights pursuant to Penal Code § 1381.5, and that the witnesses named in the affidavit in support of the complaint should be interviewed before the witnesses were no longer available or memories faded. [Exhibit "C" to the Petition, Doc. 3, E.C.R. 75-77][4] Cotsirilos then directed investigator Alan Cotten to conduct approximately ten interviews of witnesses which reports Cotsirilos reviewed. Cotsirilos met with Sevilla, petitioner's family, and with Mr. Lugo at FCI Terminal Island, and he expended approximately

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[4] "Doc" refers to the document number assigned by the Clerk of the District Court. "E.C.R." refers to appellant's Excerpt of Clerk's Record.

thirty hours of time from July, 1988, to December, 1988. [Declaration of John G. Cotsirilos, dated 12/21/88, Exhibit "D" to the Petition, Doc. 3, E.C.R. 78-83]

On or about December, 1988, the Lugo family could no longer afford legal fees for their son's defense. On December 21, 1988, Cotsirilos submitted a sealed declaration to the Municipal Court in support of Lugo's request that the court appoint Cotsirilos due to petitioner's indigency. The declaration fully set forth the facts surrounding Cotsirilos' representation of Mr. Lugo. Central to the issue of appointment was the fact that Cotsirilos was retained specifically to demand Mr. Lugo's speedy trial rights pursuant to Penal Code § 1381.5. Cotsirilos stated:

> This was of some particular importance for Mr. Lugo, due to the fact that the co-defendant named in the complaint, Mr. Michael Edward Smith, was, and is, presently out of the State of California and therefore, not the subject of the same litigation as Mr. Lugo in this murder prosecution. Should time pass, Mr. Smith could be joined with Mr. Lugo and prosecuted as a co-defendant in the same proceedings, which from a review of this matter, is not in Mr. Lugo's best interest.

Cotsirilos stated that it was Mr. Lugo's desire not to waive his right to a speedy preliminary examination, nor to waive his speedy

trial rights pursuant to Penal Code § 1381.5. Cotsirilos further stated that it was his understanding that Mr. Lugo desired to have Cotsirilos continue as his counsel due to his familiarity with the case and the establishment of a working relationship between them. [Declaration of John G. Cotsirilos, dated 12/21/88, Exhibit "D" to the Petition, Doc. 3, E.C.R. 78-83]

On the morning of December 21, 1988, Cotsirilos requested that Judge Patrick of the Municipal Court hear a motion to appoint him as counsel for petitioner and that the above-referenced declaration be filed and sealed with the Court. [A.R.T. 3[5]] After some discussion in open court, Judge Patrick first heard *ex parte* argument *in camera* from Cotsirilos. Cotsirilos expounded on the reasons set forth in his declaration filed under seal with the Court as described above. Again, he stressed the importance of asserting petitioner's speedy trial rights to the Court:

> Mr. Lugo's desire when he learned he was going to be brought for arraignment was that he proceed as quickly as possible, which in my opinion probably isn't [sic] what is probably in his interest because the co-defendant in this case is out of the state and potentially

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[5] "A.R.T." refers to the Augmented Reporter's Transcript of December 21, 1988, filed with the California Court of Appeal and lodged with the district court.

> a harmful witness to Mr. Lugo, although it is disputable as to -- I doubt whether anything he said would be used against Mr. Lugo because he is a named co-defendant, and his statement would not be usable; but; the district attorney has confirmed, and I have learned there are -- he has made ongoing attempts to settle his matter with the district attorney's office.
>
> So that, as Mr. Lugo's counsel up to arraignment, my advice to him has been that he proceed as readily as possible and assert his speedy trial rights.

[A.R.T. 10]

Deputy District Attorney Craig Rooten, representing the People, then requested and received an *in camera* hearing with Judge Patrick. At that hearing, D.D.A. Rooten related to the Court that Detective Decker of the San Diego Sheriffs Department had relayed to him that co-defendant Smith believed that petitioner had been attempting to buy Smith's silence. D.D.A. Rooten further asserted that Smith told Detective Decker that morning a large sum of money was deposited into his family's bank account and that Cotsirilos and his investigator would be up to see him in Colorado, and depending on what answers were given, another large sum of money would be deposited in Smith's family's bank account. [A.R.T. 14] D.D.A. Rooten continued:

> Based upon that statement and statements that had been attributed to Mr. Charles Sevilla in his representation of Mr. Lugo in the federal case for which Mr. Lugo is in custody, I believe that Mr. Cotsirilos is carrying on a pattern of conduct that was initially begun by Mr. Sevilla to secure Mr. Smith's silence in this case, and I just think that the time may come when Mr. Cotsirilos, if not a witness, may find himself in a different capacity, your honor, on this case, and I cannot be more specific with the Court because Mr. Smith has not been more specific with Detective Decker and I will candidly tell the Court that we have been unable to corroborate much of anything that Mr. Smith has ever told us.

[A.R.T. 14-15]

Following this *in camera* hearing, Judge Patrick refused to appoint Cotsirilos to petitioner's case, finding that the instant case did not "measure up" to Harris v. Superior Court, 19 Cal.3d 786 (1977). The Court further noted that although the Court "certainly consider[ed] the reasons Mr. Rooten gave in chambers," he had pretty well made up his mind based on Harris. [A.R.T. 18]

In the afternoon of the same day, December 21, 1988, a hearing was held before Judge Patrick. Conflicts attorney C. Logan McKechnie at that hearing requested the appointment for petitioner and represented to the Court that he had been contacted by the Office

of Defender Services and asked to represent petitioner. [R.T.II, 2[6]]

At this same proceeding, petitioner, at McKechnie's insistence, waived his right to a speedy preliminary examination within ten days, waived his right to a speedy trial within sixty days, and waived his right to a trial within ninety days pursuant to Penal Code § 1381.5. [R.T. II, 2-3] Judge Patrick then set a preliminary examination date of May 19, 1989. [R.T. II, 4]

On May 15, 1989, after the expiration of five months, the case was again called for preliminary examination. Again, Mr. McKechnie stipulated to a continuance with the People, and the preliminary hearing was reset to August 9, 1989. On August 9, 1989, another joint motion for continuance between Mr. McKechnie and the prosecution extended the date of the preliminary hearing to September 19, 1989. On September 19, 1989, the preliminary hearing was again continued on joint motion to November 13, 1989. On that date, the preliminary hearing was again continued on motion of co-defendant Michael Smith, who had by that time been removed

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[6] "R.T." refers to the Reporter's Transcript on Appeal to the California Court of Appeal as designated by volume number by the court reporter, lodged with the district court.

from out of state to the jurisdiction of the San Diego Municipal Court on or before November 9, 1989. Petitioner's trial counsel, Mr. McKechnie, did not object to that request made on behalf of co-defendant Smith. On the new date, January 8, 1990, the preliminary hearing finally went forward when petitioner's counsel's further motion for continuance was denied. [Exhibit "H" to the Petition, Doc. 3, E.C.R. 100-108]

Petitioner and co-defendant Smith proceeded jointly to jury trial on October 23, 1990. On November 27, 1990, petitioner was found guilty of all charges. On January 3, 1991, petitioner was sentenced to consecutive terms of twenty-five (25) years to life for murder in the first degree under Penal Code § 187(a), and two one-year terms pursuant to Penal Code § 12022(a), the first term to run consecutive to Count One, and the second term stayed as to Count Two for a total of fifty-one (51) years to life. [C.T. 2, 320-321]

Petitioner appealed his conviction and sentence to the California Court of Appeal, Fourth Appellate District, Division One, and also submitted a companion petition for writ of habeas corpus to that court. [Attached as Exhibit "E" to the Petition, Doc. 3, E.C.R.

84-96] In this petition, petitioner alleged that his trial counsel accepted the appointment to represent petitioner knowing that he could not possibility expeditiously try the case as required by the circumstances, and did so for a purely personal motive, to secure as many appointments as possible in order to bill the County of San Diego as much as possible for his services. In support of this claim, petitioner presented records secured from the Department of Alternate Defense Counsel which appointed McKechnie to represent petitioner which indicated the following: (1) C. Logan McKechnie represented nine (9) defendants, including petitioner, from November 1, 1988, to November 30, 1989; (2) Five of those individuals were charged with murder pursuant to Penal Code § 187; (3) C. Logan McKechnie accepted appointment as defense counsel to four (4) other individuals in the month of December, 1988, two of whom were charged with murder and another individual charged with murder involving special circumstances justifying the death penalty. In one of these cases, that of Terry Bemore (the case alleging special circumstances), McKechnie accepted the appointment eighteen (18) days prior to accepting the appointment as petitioner's defense

counsel; (4) During the period from November 1, 1988, to November 30, 1989, Mr. McKechnie billed the Department of Alternate Defense Counsel for 3,921.4 hours, and was paid a total of $275,705. [Exhibit "G" to the Petition, Doc. 3, E.C.R. 98-99] Based upon these statistics, petitioner alleged that Mr. McKechnie urged him to waive time for his preliminary examination and trial because of his desire to bill the maximum number of hours in the felony cases to which he had been appointed, and to discharge his responsibilities in those cases. This situation created a conflict of interest between petitioner and McKechnie which resulted in McKechnie's delaying petitioner's trial in spite of his knowledge of the urgency in proceeding to trial expeditiously in petitioner's case in order to avoid his being joined for trial with his co-defendant Smith. Petitioner contended that this conflict of interest between himself and his trial counsel adversely affected his counsel's performance on his behalf as it resulted in his joinder for trial with his co-defendant, with disastrous consequences, exactly as predicted by Mr. Cotsirilos when he advised Judge Patrick of the reasons necessary to appoint an attorney to represent petitioner who could be prepared and available to try the case in an expeditious

fashion. The California Court of Appeal affirmed petitioner's convictions and sentence, and denied his petition for writ of habeas corpus without an evidentiary hearing. [Id.] On March 10, 1993, the California Supreme Court denied petitioner's petition for a discretionary review to that court. [Exhibit "B" to the Petition, Doc. 3, E.C.R. 74]

On August 23, 1994, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Southern District of California, raising, *inter alia*, the issues presented to this Court in this petition. On August 15, 1996, an order was entered by Honorable Barry Ted Moskowitz, United States District Court Judge, denying the petition without an evidentiary hearing. [Doc. 14, E.C.R. 198-201] On September 13, 1996, petitioner filed his notice of appeal from the order of the district court denying his petition. As set forth above, the United States Court of Appeals for the Ninth Circuit affirmed the order of the district court on July 24, 1997, and ordered the Petition for Rehearing and Suggestion for Rehearing En Banc denied on September 29, 1997.

Petitioner's convictions arise from the events of July 9, 1986,

when the bodies of Timothy Ridgewell and Robert Pharoah were found in a rural area of northeast San Diego County near Warner Springs in the early morning hours. Ridgewell had been shot six times, his throat had been slashed, and he had been stabbed one additional time. [R.T.T.[7] 142] One of the gunshot wounds inflicted on Ridgewell had been fired through his neck after his throat had been slashed. [R.T.T. 142] Pharoah had also been shot six times and had, in addition, been stabbed three times on the right side of his back. [R.T.T. 148-152] At the jury trial of petitioner and his co-defendant Smith, the evidence against them consisted exclusively of the testimony of their criminal associates in the illegal manufacture of methamphetamine. These individuals testified that both petitioner and Smith had admitted their involvement in the killings to them and had stated that the reason that the victims were killed was because they were informants for the Drug Enforcement Administration, and had provided information which had led to petitioner's arrest earlier on May 13, 1986, and charges in federal court of various offenses related to the illegal manufacture and distribution of methamphe-

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[7] "R.T.T." refers to the Reporter's Transcript of Trial Proceedings, lodged with the district court.

tamine. [R.T.T. 417-441] Each of the persons testifying against petitioner and Smith, however, were themselves members of the methamphetamine manufacturing and distribution organization headed by appellant, were each granted immunity from prosecution, and had previously given inconsistent statements to law enforcement officers investigating the killings. The murder weapons were never found, and no scientific evidence of any sort supported the testimony of these witnesses.

At the conclusion of the prosecution's case, co-defendant Michael Smith took the witness stand in his own defense and testified that on the evening of July 8, 1996, he and petitioner, together with the victims, Ridgewell and Pharoah, left the home of Ridgewell's brother, Patrick, in Ridgewell's truck. Appellant was driving the vehicle, co-defendant Smith was seated in the passenger seat, and the victims were seated in the rear bed of the truck under a camper shell. Smith testified he believed the purpose of the trip was to "cook" (manufacture) methamphetamine in a remote location. [R.T.T. 926-935] During the trip, Smith related that he fell asleep. He was awakened by gunshots, jumped out of the truck and ran around to the

rear of it. The first thing he saw was Pharoah lying on the ground, then he saw petitioner with Ridgewell on the ground. At that point, petitioner turned toward him with a gun, pointed it at him and told him that he was to get involved or he could die with them. With the gun turned on him, Smith testified he cut the throat of Ridgewell, who was on the ground and presumed by Smith to be already dead. Petitioner, according to Smith, then directed him to stab Pharoah, which he did. Petitioner and Smith then got back into Ridgewell's truck and left the scene. [R.T.T. 934-942] Petitioner threatened Smith with death if he talked to the police or told anyone what he knew. Petitioner and Smith then disposed of the gun which was used to kill the victims by throwing it into San Diego Bay by Mariner's Point. [R.T.T. 942-943]

Counsel for co-defendant Smith, from the outset of the trial and opening statements, assumed the role of co-prosecutor. In his opening statement, Smith's attorney characterized petitioner as the head of a large scale methamphetamine manufacturing operation in which Smith had absolutely no interest or participation. [R.T. 45-46] He continued to characterize appellant as an evil and vengeful person

who held the members of his organization in fear. He indicated that Smith was only on the scene by happenstance, and participated in the killings of the victims only because he was threatened with death himself by petitioner if he did not participate.

Smith's attorney continued in the role of co-prosecutor by repeatedly eliciting on cross-examination of the prosecution's witnesses, petitioner's drug dealings and lifestyle, as well as his threats to others in his organization. [R.T.T. 215, 354-355, 379-380, 496, 551-552, 565-567, 621, 644-651, 658-661, 686-687] Smith's counsel also vigorously cross-examined petitioner when he testified on his own behalf at trial, pointing out inconsistencies in the version of events which petitioner had offered on the witness stand as opposed to what he had told the police earlier in a statement given in connection with plea negotiations between petitioner and the prosecution. Smith's attorney also used the report of petitioner's statements to impeach the testimony of a psychologist offered by petitioner to attempt to establish the defense of diminished capacity, by pointing out inconsistencies and contradictions in the version of events related to the psychologist as opposed to that provided by

petitioner to the police pursuant to plea negotiations. [R.T.T. 1524-1527]

In closing argument, Smith's counsel portrayed petitioner as a drug-crazed monster, who held all of his associates in fear of death. He referred repeatedly to the contrasting lifestyles of Smith and petitioner and asserted his client's defense -- that he only participated in the killings because he was threatened with death himself if he did not. [R.T.T. 1799-1896] During the course of that argument, Smith's attorney stressed the inconsistencies between petitioner's testimony and the statement which he had given to the prosecution. [R.T. 1830-1831]

Petitioner testified that he left with co-defendant Smith and the two victims to attend a party on the evening of July 8, 1986, after free-basing cocaine with them. [R.T.T. 1282-1285] Petitioner was driving Ridgewell's truck, but was being directed by Smith as to where to go. Along the way, the four occupants of the truck began free-basing cocaine. During this trip, Smith began mumbling and acting strangely. Smith informed petitioner while the two of them were riding together in the cab of the truck that he believed Ridgewell

and Pharoah were the informants who were responsible for petitioner's earlier arrest on federal drug charges. [R.T.T. 1285-1290] Smith then directed petitioner to pull off the freeway in the area of Deer Springs Road in northeastern San Diego County, directed him to drive over a bridge and down a rural road. Smith told petitioner he was going to take care of the situation, reached under the seat and pulled out a Tec-9 revolver and handed it to petitioner and said, "Follow my lead." Smith then took a knife from under the seat and got out of the passenger door. Petitioner turned off the engine, got out of the truck, walked in front of the vehicle, and was looking around. When petitioner walked to the back of the truck, he saw Smith with his knife to Ridgewell's throat. Smith then slashed Ridgewell's throat and threw him to the ground. Smith then walked up to petitioner and told him, "Pop him or I'll stick you." Petitioner then lifted the gun and fired a couple of times. As he was doing this, Smith yelled that Pharoah was getting away and to shoot him. Petitioner did not shoot Pharoah. The gun was then taken from his hand and Smith shot Pharoah as well. Petitioner denied any willing participation or foreknowledge of the killings. [R.T.T. 1290-1292]

REASONS FOR GRANTING THE WRIT

I.

Whether The Trial Court Was Required Under The Circumstances of This Case to Appoint an Attorney For Petitioner Who Could Expeditiously Try His Case Under The Principle Announced by This Court in *Wood V. Georgia*, 450 U.S. 261 (1981), Is an Important Recurring Constitutional Issue, Requiring Resolution by This Court

The memorandum decision of the Ninth Circuit, while cryptically noting that petitioner raised the issue of the obligation of the trial court to appoint him conflict-free counsel,[8] did not independently analyze that claim as implicating the obligation of the trial court to appoint conflict-free counsel, but rather dismissed it as a claim of ineffective assistance of counsel. The court then held that it was unnecessary to examine any of the assignments of ineffective assistance of counsel raised by petitioner, as the court found that the evidence of appellant's guilt was so overwhelming that he could not possibly satisfy the prejudice prong of Strickland v. Washington, 466

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[8] The Court of Appeals memorandum refers to the issue as "refusal to appoint counsel of choice. . . ." (Appendix "A", p. 2) However, the actual contention advanced in petitioner's opening and reply briefs was, "appellant was denied the effective assistance of counsel due to the refusal of the trial court to appoint the attorney of his choice, or any other attorney who was available and prepared to try the case within ninety days of appellant's appearance in the trial court in accordance with the appellant's speedy trial demands in violation of the Sixth Amendment to the United States Constitution." (Appellant's Opening Brief, pp. 32-38; Appellant's Reply Brief, pp. 7-10)

U.S. 668, 697 (1984). This analytical error was again brought to the attention to the Court of Appeals in petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. (Petition for Rehearing, pp. 10-11) However, that petition was summarily denied without the court's having addressed this issue.

In Wood v. Georgia, 450 U.S. 261, 272, fn. 18 (1981), this Court, relying upon its decision in Cuyler v. Sullivan, 446 U.S. 335, 347 (1980), held that when a trial court is made aware of circumstances suggesting a conflict of interest between a criminal defendant and his counsel, the court has an independent obligation to make inquiry to insure that no such conflict of interest exists, or to remedy the situation in order to protect a defendant's Sixth Amendment right to the effective assistance of counsel.

> [Cuyler v.] Sullivan mandates a reversal when the trial court has failed to make an inquiry even though it "knows or reasonably should know that a particular conflict exists."

Wood v. Georgia, 450 U.S. at 272, fn. 18; see also, Holloway v. Arkansas, 435 U.S. 475, 488-489 (1978).

In the case before the Court, the record below indicates with crystal clarity that the exigencies of the situation requiring the

attorney appointed to represent petitioner to be available to promptly try petitioner's case to avoid prejudicial joinder with his co-defendant Smith were brought to the trial court's attention prior to the appointment of counsel. Yet, in spite of being provided with this information by petitioner's former counsel, Mr. Cotsirilos, the court inexplicably approved the appointment of Mr. McKechnie who, immediately after receiving the appointment, moved for and received a continuance of the preliminary examination for a period of five (5) months. Petitioner's trial counsel subsequently continued the preliminary examination of the case five (5) more times. The preliminary examination finally went forward on January 8, 1980, when petitioner's counsel's motion for a further continuance was denied. By that time, the damage had been done; petitioner was joined for trial with his co-defendant Smith whose return from the State of California had, by that time, been secured by the prosecution, and was forced to trial jointly with Smith one year and ten months after Cotsirilos' appearance to request appointment and urge an expeditious trial. At that trial, petitioner faced not one, but two prosecutors, the representative of the State of California, as well as

the attorney for co-defendant Smith. As a result, petitioner was forced to take the witness stand to defend himself against Smith's allegations that he had forced Smith, at peril of his own life, to participate in the murders. Had the trial court discharged its obligation to appoint an attorney who was available to try the case within ninety (90) days of petitioner's arraignment, in accordance with his speedy trial demand, petitioner could and would have relied upon the state of the evidence rather than testifying at trial. Such a trial would have been vastly different than the proceeding which appellant was accorded.

Petitioner specifically alleged, and presented convincing statistics to establish, that his appointed trial counsel, Mr. McKechnie, accepted the appointment knowing that he could not possibly expeditiously try the case as required by the circumstances, and did so for a purely personal motive -- to secure as many appointments as possible in order to bill the County of San Diego as much as possible for his services. Further, the actions of Deputy District Attorney Rooten in impugning the integrity of Mr. Cotsirilos and Lugo's prior counsel in the federal case, Mr. Charles Sevilla,

strongly suggest that the unsupported allegations of misconduct made by Rooten against these lawyers were designed to prevent the appointment of a conscientious advocate who would have appropriately responded to the situation presented by vigorously asserting petitioner's speedy trial rights. Not one shred of evidence which tended to support in any way the accusations leveled against these lawyers was ever brought forward by the prosecution, leading to the inescapable conclusion that Rooten repeated these baseless allegations in order to dissuade the trial court from appointing Cotsirilos to represent petitioner in order to gain tactical advantage for the prosecution.

While the conflict of interest alleged to have existed in this case does not involve multiple representation of parties with antagonistic interests, as was the case in Cuyler v. Sullivan, supra, nor a conflict arising out of the attorney being paid by a person other than the defendant or his family as was the case in Wood v. Georgia, supra, this Court has not limited its consideration of attorney conflicts of interest to those circumstances. In Strickland v. Washington, 466 U.S. at 692, the Court used a broader definition, stating that an actual

conflict of interest exists when "counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." See also, Beets v. Collins, 986 F.2d 1478, 1483 (5th Cir. 1993). Under the circumstances presented by this case, there can be no doubt, particularly given the fact that a habeas petitioner's allegations must be taken as true for the purpose of determining his entitlement to an evidentiary hearing, that the actions attributed to trial counsel by petitioner, and the asserted reasons therefore, constitute a breach of the "duty of loyalty" of the most basic sort. Townsend v. Sain, 372 U.S. 293, 312 (1963); United States v. Rodriguez-Rodriguez, 929 F.2d 747, 749 (1st Cir. 1991); Harris v. Pulley, 852 F.2d 1546, 1565 (9th Cir. 1988).

However, in order to clarify the obligation of a trial court to make inquiry into the possible existence of a conflict of interest between attorney and client, where that conflict does not relate to multiple representation, or a third party fee payment arrangement, this Court ought to grant certiorari to resolve this reccurring issue. See, Beets v. Scott, 65 F.3d 1258, 1266, fn. 10 (5th Cir. en banc 1995)

[collecting cases involving all aspects of the "breach of duty of loyalty"].

As Justice Huffman of the California Court of Appeal recognized in his concurring and dissenting opinion in petitioner's direct appeal to that court:

> In my view, Lugo has raised a number of important questions concerning his representation in the trial court that can only be resolved in an evidentiary hearing. While I recognize that Lugo had no right to have his retained counsel appointed when he ran out of funds, it seems to me there should be some reason to appoint a different attorney than one who was so busy that he must delay the case a number of months before proceeding. Certainly, an inference can be drawn that Lugo could not benefit from a joint trial. A joint trial may or may not have been prejudicial, but it certainly was not beneficial. Yet the mere appointment process seems to have resulted in such a joint trial. We should have an evidentiary record on which to evaluate the results of the appointment of an apparently unavailable attorney. We need to know if new counsel was aware of the potential prejudice of joinder if this case was delayed until the co-defendant was available and whether there was an alternative to the delay.

[Exhibit "A" to the Petition, Huffman, J., concurring and dissenting, p. 2, Doc. 3, E.C.R. 72-73]

II.

The Question of Whether The Standard of *Cuyler V. Sullivan*, 446 U.S. 335 (1980), Rather Than The "Cause And Prejudice" Standard of *Strickland V. Washington*, 466 U.S. 668 (1984), Applies to Alleged Conflicts of Interest Such as That Presented in This Case Is an Important Question of Law Requiring Resolution by This Court, And Has Divided The Federal Circuit Courts of Appeal Which Have Considered The Question

Under this Court's decision in Cuyler v. Sullivan, 446 U.S. 335, 350 (1980), a criminal defendant who alleges a conflict of interest between himself and his attorney need not show specific outcome-determinative prejudice as is generally required to obtain relief in the usual ineffective assistance of counsel setting under Strickland v. Washington, 466 U.S. 668, 686 (1984). Rather, in such a case, the defendant need only establish "that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, supra, 446 U.S. at 350.

However, the question of whether that lesser standard of prejudice applies to conflicts of interests other than multiple representation and perhaps third-party fee payment arrangements has divided the federal circuit courts of appeal which have considered the question. The Fifth Circuit, in its en banc decision in Beets v. Scott,

65 F.3d 1258, 1271-1273 (5th Cir. en banc 1995), determined that the more exacting Strickland standard applied to the evaluation of claims of conflict due to breach of loyalty outside the multiple representation context. This holding, as the Beets Court acknowledged, was contrary to the decisions of the First, Second, Fourth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits which have applied Cuyler's standards to a variety of conflicts of interest not involving multiple representation or third party fee-paying agreements. Beets v. Scott, supra, 65 F.3d at 1266, fn. 10.

Although the Ninth Circuit in United States v. Hanoum, 33 F.3d 1128, 1130-1132 (9th Cir. 1994), applied Cuyler's "actual conflict" and "adverse effect" standards to a case in which the alleged conflict consisted of the defense attorney having sex with the defendant's wife and therefore had an incentive to make sure the defendant was found guilty, the panel of the Ninth Circuit applying this case did not analyze petitioner's claim under this standard. In dealing with this issue, as in the claim relating to the trial court's obligation to appoint conflict-free counsel discussed in the preceding

argument, the panel of the Ninth Circuit deciding this case simply acknowledged that this claim was made, and then proceeded to summarily dismiss it, holding that petitioner could not possibly prevail on this claim because of the overwhelming evidence of his guilt, thereby holding, in essence, that Strickland's "prejudice" prong could not possibly be satisfied. The Ninth Circuit panel in this case was specifically advised of petitioner's contention that the Cuyler standard applied to the claim which he was raising in his reply brief, in oral argument, and again in his Petition for Rehearing and Suggestion for Rehearing En Banc. (Appellant's Reply Brief, pp. 3-7; Petition for Rehearing, pp. 6-10) However, here again, the panel failed to analyze petitioner's claims in terms of the Cuyler standard in its memorandum decision, and summarily denied the Petition for Rehearing without taking any corrective action when its error was once again brought to its attention.

The petitioner, here, in spite of having alleged specifically and repeatedly in both state and federal courts the existence of the conflict of interest which arose due to the requirements of this case that his case proceed to trial rapidly in order to avoid prejudicial joinder with

his co-defendant Smith, as ultimately occurred, and the contrary interest of his trial counsel, who delayed the trial of the case because of his overwhelming case load, as well as his desire to maximize his income, was never accorded an evidentiary hearing at any stage to prove his contentions. His allegations, and the documentation which he supplied to support his claim, clearly entitled him to such a hearing if Cuyler's lesser standard of prejudice applies to the sort of conflict of interest which he has alleged.

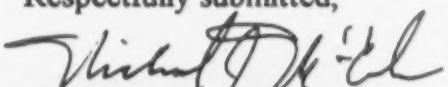
This Court should grant certiorari to clarify which standard of prejudice applies to conflicts of the type alleged here, and to resolve the conflict in the circuit courts of appeals as to which standard applies.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

DATED: December 23, 1997

Respectfully submitted,



MICHAEL J. McCABE
Attorney for Petitioner
KEITH ROBERT LUGO

DECLARATION OF SERVICE

Michael J. McCabe, a member of the Bar of this Court, hereto certifies that on December 26, 1997, I mailed copies of the enclosed Petition for Writ of Certiorari on the following:

Clerk (40 copies)
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

United States Court of Appeals
For the Ninth Circuit
Post Office Box 193939
San Francisco, CA 94119-3939

Warren P. Robinson
Deputy Attorney General of California
Post Office Box 85266
San Diego, CA 92186-5266

Keith R. Lugo, No. E91649
High Desert State Prison, Facility C2-227 Upper
Post Office Box 3030
Susanville, CA 96130

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 26th day of December, 1997, at San Diego, California.

Michael J. McCabe

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEITH ROBERT LUGO Petitioner, v. K.W. PRUNTY, WARDEN, Respondent.	) No. 96-56390) D.C. No. CV 97-1328-BTM) MEMORANDUM[1]*

Appeal from the Decision of the United States District Court
for the Southern District of California,
Barry Ted Moskowitz, District Judge

Argued and Submitted July 11, 1997
Pasadena, California

Before: CANBY and THOMAS, Circuit Judges, and KING[2]**, District Judge.

Defendant-Appellant Keith Robert Lugo ("Lugo"), appeals the denial of his habeas corpus petition, 28 U.S.C. § 2254, challenging, on grounds of ineffective assistance of counsel, his jury

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

conviction for two counts of first degree murder and his sentence of fifty-one years to life. The parties are familiar with the facts and we do not repeat them here. We have jurisdiction under 28 U.S.C. § 2253[1] and affirm.

We review de novo a district court's denial of habeas relief. Jeffries v. Blodgett, 5 F.3d 1180, 1187 (9th Cir. 1993) (citing Dickson v. Sullivan, 849 F.2d 403, 405 (9th Cir. 1988). Under 28 U.S.C. § 2254(e)(1), findings of fact by the state court are presumed to be correct and are reviewed for clear error. Id. To reverse a conviction on grounds that a defendant's Sixth Amendment right to effective assistance of counsel was violated, the defendant must show both: (1) that counsel's performance was deficient, i.e., "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) that the deficient performance prejudiced the defense, i.e., "counsel's errors were so serious as to deprive the defendant of a fair trial whose result

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[1] The Government contends that the Antiterrorism and Effective Death Penalty Act (the "Act"), bars this appeal. 28 U.S.C. § 2254(d). It does not. See Lindh v. Murphy, No. 96-6298, 1997 WL 338568, at *2 (U.S. June 23, 1997) (Act does not apply to noncapital cases pending when Act was passed); Jeffries v. Wood, 103 F.3d 827, 827 (9th Cir. 1996) (en banc) (Act does not apply to cases filed prior to the Act's effective date).

is reliable." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2063 (1984).

Lugo alleges that the following constituted ineffective assistance of counsel: (1) failure to proceed to trial before joinder; (2) refusal to appoint counsel of choice; (3) failure to object to shackling in view of the jury; and (4) failure to object to plea negotiation statements. We reject all of Lugo's claims because we find that the evidence against Lugo is in fact so overwhelming that the prejudice prong of Strickland cannot be satisfied. "A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697, 104 S.Ct. at 2069. As the state appellate court concluded:

> The appellate record in this case demonstrates that Lugo was convicted not because of any act done or not done by counsel, but because of the overwhelming evidence of his guilt. Lugo admitted at trial (and frequently had bragged of) committing the killings. His defense was that while he held a 9-millimeter automatic handgun he was coerced by his fellow executioner, Michael Smith, into committing the killings although Smith held only a knife in his hand. It is hardly surprising the jury rejected this defense, and no act or omission of Lugo's counsel, on this record, would have likely resulted in a more favorable verdict for Lugo. Nothing in the materials submitted

with the habeas petition supports a contrary conclusion.

A careful review of the record forces us to agree.

Accordingly, the district court's denial of habeas relief is

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEITH ROBERT LUGO Petitioner, v. K.W. PRUNTY, WARDEN, Respondent.	) No. 96-56390) D.C. No. CV 97-1328-BTM) ORDER

Before: CANBY and THOMAS, Circuit Judges, and KING[1]*, District Judge.

The panel has voted to deny appellants' petition for rehearing. Judge Thomas has voted to reject the suggestion for rehearing en banc. Judge Canby and Judge King have recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for

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* Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

rehearing en banc is REJECTED.

§ 2254. State Custody; remedies in Federal Courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ, and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not

resolved in the State court hearing;

(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the

circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.